

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS

CRIMINAL 06-10242-RWZ

UNITED STATES OF AMERICA

V

FRANK FAGONE

**DEFENDANT'S SUPPLEMENTAL SENTENCING MEMORANDUM
F. R. CR. P. 32(a) AND 18 U.S.C. SEC. 3553(a)**

This supplemental memorandum as an addition to the memorandum previously filed on December 17, 2007. The previous memorandum addressed the issue of the guideline calculation which treated Mr. Fagone as a career criminal. The defendant still maintains that the career criminal guidelines should not be applied in this case. If this Court chooses to apply the guidelines then this memorandum is submitted to present the defendant's proposal as to an appropriate sentence

Frank Fagone pled guilty to the four counts of the indictment alleging conspiracy, distribution and possession with intent to distribute controlled substances (heroin and cocaine). There is no mandatory minimum sentence prescribed by statute. The defendant does not challenge the presentence report regarding the factual assertions contained in the report or the calculations presented regarding the guidelines. It is the defendant's assertion that the sentence suggested by the guidelines and the pre-sentence report is substantially greater than is "necessary to comply with the purposes set forth" in 18 U.S.C. 3553 (a). Specifically, it is the defendant's position that following the career offender guidelines would be particularly inappropriate in this case. If the Court chooses to apply the guidelines, this is an appropriate case for substantial

departures and certainly for a variance from the guidelines.

SENTENCING FRAMEWORK AFTER KIMBROUGH & GALL

In light of the Supreme Court's recent decision in Kimbrough and Gall it is apparent that this Court has ample discretion to stray from the dictates of the Guidelines. Kimbrough v. U.S., 128 S. Ct. 558 (2007); Gall v. U.S., 128 S. Ct. 586 (2007). There is no legal presumption that the Guidelines should govern in any particular situation. United States v. Booker, 543 U.S. 220 (2005); United States v. Jimenez-Beltre, 440 F. 3d 514 (CA1 2006). They offer merely a "rough approximation" of sentences which might meet the objectives of sec. 3553(a). Rita v. U.S., 127 S. Ct. 2456 (2007). The guidelines focus primarily on the past criminal activity for aggravating or mitigating factors. Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1. While this approach serves the purpose of providing some consistency in sentences, it does not fulfill a judges obligations of addressing the individual issues of any particular defendant. A myopic focus on the guideline range of sentencing not only undercuts the concept of "advisory" guidelines but it skirts the primary responsibility of the sentencing judge.

Gall recognizes that the sentencing judge is in a superior position to find fact relevant to the particular case. Indeed, the guideline ranges are not to be presumed to be reasonable. Gall @ 597. This is especially true in cases like the present one involving guidelines which are not based on empirical evidence. Each judge in evaluating an individual to be sentenced must:

"consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue"

Koon v. United States, 518 U.S. 81 @ 113 (1996)

It is submitted that after due consideration of this "unique study" this court should impose a sentence lower than that provided by the presentence report. The sentencing range proposed in

the pre-sentence report fails to properly reflect all of the section 3553(a) considerations, falls outside the “heartland” of the guidelines and grossly overstates the seriousness of the defendant’s record. USSG sec.5K2.0, United States v. Booker, 543 U.S. 220 (2005), Kimbrough, supra. The probation office notes in the presentence report that a variance may be appropriate with respect to the nature and circumstances of the offense and the defendant’s history and characteristics. The guideline range is merely one of the factors to be considered in determining an appropriate sentence. However the guidelines themselves are the starting point and must be considered. Gall @ p. 596

FACTORS MITIGATING IN FAVOR OF A LESSER SENTENCE IN THIS CASE

The pre-sentence report calculates the advisory sentence following the career offender guidelines. USSC sec. 4B1.1. The defendant does not contend that the guidelines are incorrectly calculated. This guideline range is an appropriate “starting point” for this Court. From this starting point the presentence report suggest that the Court may vary because of the nature of the offense ands the defendant’s particular characteristics. 18 U.S.C. 3553 (a) (1)

PROPOSED VARIANCE

Without reiterating all of the facts set forth in the previous memorandum, the defendant asserts that this Court should order a substantial variance from the guidelines.

A.The instant offense. The defendant’s criminal history category is VI without regard to the career criminal guideline. The probation officer refers to the instant offenses as one which involved a “relatively small amount of drugs”. (PSR paragraph 157).The instant indictment involved drugs of an equivalent weight of 54.06 Kg of marihuana. There were two transactions over a one week period. The short span of criminal activity and the small amount of drugs should be weighed in the defendant’s favor.

B.Career offender predicates. The career offender designation comes into play because

of convictions for three prior drug offenses. (Copies attached). All three convictions were for violations of the Massachusetts statute prohibiting possession with intent to distribute crack cocaine. The first arrest was on July 4, 2003. The following arrests were on December 8 and December 10, 2003. The July 4th arrest resulted in the confiscation of what in the officers estimation was 9.8 grams of crack cocaine from Frank Fagone. The December 8 arrest involved an automobile stop. At that time drugs were recovered from the driver Lorie Knochel and from the ground next to where the rear passenger exited the vehicle. The rear passenger was Joseph Fagone, Frank's brother. No drugs were found on Frank. On the December 10 arrest, Frank was arrested while in the rear of a cab. Upon exiting the cab the officer recovered from the floor of the cab what he estimated to be 10 grams of Crack cocaine. All three cases were consolidated and Mr. Fagone received concurrent sentences of Two (2) years in the House of Correction. It is submitted that these arrests happening some two and one half years before the instant case also involved a relatively small amount of drugs. It is apparent that the plea was a "package" and that the cases may well have been subject to trial if standing alone. Nevertheless, when calculations are made which consider the career criminal provisions, the offense level jumps to 32 and the sentencing range is now 210 to 262 months.

C. The Defendant's characteristics. As indicated in the defendant's evaluation and presentence report, Mr. Fagone was the object of extreme parental neglect as a child. His education was very limited. The psychologist's report indicates that he has a significant learning deficit. His reading, math and spelling abilities are all in the elementary school range. At one point in his youth he was tested and determined to have a full IQ score of 70. Despite his incarcerations, foster home placements and social services provided by various agencies, he has yet to acquire a GED. Considering all of the abuse and neglect

suffered by Mr. Fagone in his childhood, Dr. Chialant opined that he was suffering from post traumatic stress disorder. Mr. Fagone's letter to the Court indicates that he began violating the law at an early age but that these violations were of necessity. His initial motivations were to feed and protect his younger siblings. Of course his actions as a young man do not justify the crimes he has committed today. Nonetheless his earlier crimes, committed out of a sense of necessity, and the negative reactions from authorities could only help to cement his own sense of low self esteem.

It is submitted that these factors alone should entitle the defendant to a substantial variance from the guideline range. Further it is argued that apart from the variance, this court should grant a substantial departure based on the same factors.

PROPOSED DEPARTURES

It is submitted that a downward departure should be granted because of the defendant's diminished capacity as well as the extraordinary history of abuse as a child. In general, this Court may depart from the guidelines because of mitigating circumstances in the background character and conduct of the defendant which is not otherwise prohibited (U.S.S.G Manual sec. 1B1.4); if the guidelines significantly over-represent the seriousness of the defendant's record (U.S.S.G. 4A1.3) or if this Court finds mitigating circumstances not adequately taken into account by the guidelines. (U.S.S.G 5K2.0)

Courts have determined that post traumatic stress syndrome (disorder) may form the basis for departure. See: United States v. Menyweather, 447 F.3d 625 (9th Cir. 2006); United States v. Risse, 83 F. 3d 212 (8th Cir. 1996); United States v. Cantu, 12 F.3d 1506 (9th Cir. 1993); United States v. Glick, 946 F.2d 335 (4th Cir. 1991) Likewise, the presence of severe abuse may be the basis for a departure. See: United States v. Walter, 256 F.3d 891 (9th Cir. 2001); United States v. Rivera, 192 F.3d 81 (2nd Cir. 1999); United States v. Brown, 985 F.2d 478 (9th Cir

1993); United States v. Roe, 976 F.2d 1216 (9th Cir. 1992).

CONCLUSION

For the above reasons the defendant requests that this Court grant him significant departures and/or variances from the range of sentence set forth in the guidelines.

Respectfully submitted:

/s/ John P. Moss, Jr.

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CERTIFICATE OF SERVICE

I, John P. Moss Jr., hereby certify that this document was sent electronically to the registered participants as identified on the Notice of Electronic filing by the CM/ECF of this District today February 1, 2008. No party requires service by mail.

/s/ John P. Moss,Jr.
John P. Moss, Jr.